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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BERNARD CLARENCE HOWARD, Defendant and Appellant.	C068435 (Super. Ct. No. 09F09375)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

On June 7, 2009, based on a tip, two Folsom State Prison correctional officers conducted strip searches of defendant Bernard Clarence Howard and his cell mate. When the officer told defendant to remove his socks and hand them over, defendant placed them on a rail and one sock fell to the lower tier. The officer put defendant in a holding cell, retrieved the sock that

had fallen below, and in the toe portion of that sock, found a small quantity of marijuana wrapped in cellophane. In defendant's pant pocket, the officer found a handwritten note by persons unknown. An expert opined that the note referred to marijuana.

Two inmates, including defendant's cell mate, testified on behalf of defendant, indicating that defendant's sock fell in the vicinity of the showers where other prisoners' clothing could be found.

A jury convicted defendant of possession of a controlled substance in prison (Pen. Code, § 4573.6). In bifurcated proceedings, the court found a strike prior (2005 first degree burglary) and a prior prison term allegation (1999 robbery) to be true.

On defendant's motion, the court struck the strike prior (Pen. Code, § 1385). The court imposed the midterm of three years for the offense plus one year for the prior prison term and ordered the sentence to be served consecutively to defendant's current sentence.[1]

Defendant appeals.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the

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[1] The trial court originally imposed a lab fee (Health & Saf. Code, § 11372.5) and penalty assessments. On defense appellate counsel's request, the trial court issued a minute order and amended abstract of judgment indicating that the fee and assessments had been stricken.

case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra,* 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief, raising several issues. He claims the sock was not his. He notes that at the time of the incident, the area was not documented with photographs, evidence cones, video, or even fingerprint evidence from the cellophane wrapper, making the case as one of his word against the officer's.

The jury determined that the correctional officer was more credible than the defense witnesses. Because the correctional officer's testimony was not inherently improbable, it is not our role on appeal to reweigh his credibility. (*People v. Barnes* (1986) 42 Cal.3d 284, 306.)

Defendant complains that the prosecution was allowed to introduce a reenactment video into evidence while he was not able to prepare one because of his confinement. Defendant further complains the reenactment video was inaccurate, misleading, and recorded more than a year after the incident at issue here.

To preserve for appeal an objection to the introduction of evidence, a party must object in the trial court, state the specific grounds, and specify the particular evidence that he wishes to exclude. (*People v. Harris* (1978) 85 Cal.App.3d 954, 957.) Here, defendant was represented by defense counsel who

did not object to the introduction of the reenactment video. Defendant's complaint on appeal about the reenactment video has not been preserved for appeal.

To the extent defendant's complaint is with the performance of his attorney, we reject it. To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

"'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, there is a satisfactory explanation for defense counsel's decision not to object to the introduction of the reenactment video into evidence. (*Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) The reenactment video was used by the prosecutor to demonstrate the time it takes to put a cooperative inmate into a holding cell (one-and-one-half minutes). The officer lost sight of the sock for about 30 seconds. Defense counsel attacked the video reenactment as done over a year after the incident and argued it differed from the incident as described by the officer in his testimony. Defense counsel further argued the video was based on the memory of the officer

who did not know what he could see from one place to the next. Defense counsel used the video to attack the credibility of the officer. Defendant has failed to demonstrate that counsel's performance was deficient.

Defendant complains that the prosecutor, after attacking the credibility of a defense witness (a prisoner), excused one of the prosecution witnesses (a correctional officer) who confirmed, off-the-record, the statement of the defense-witness prisoner that it was a common practice for inmates to volunteer on days off. The defense-witness prisoner testified that he had been working as a volunteer at the time of the incident and had been in the vicinity of defendant's search and the showers. Defendant also complains that his attorney failed to make a record or call the correctional officer to corroborate the defense-witness prisoner.

Defendant's complaint about the prosecutor has not been preserved. "'It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion'--and on the same ground --'he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' (*People v. Benson* (1990) 52 Cal.3d 754, 794[].)" (*People v. Davis* (1995) 10 Cal.4th 463, 505-506.)

Moreover, the prosecutor did not commit prosecutorial misconduct. "'"'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such

unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The prosecutor did not commit misconduct in determining which witnesses to call to establish his case against defendant.

Defense counsel made a partial record of the off-the-record discussion concerning witnesses not called to testify. Prior to the court instructing the jury and at defendant's request, defense counsel stated: "[A]fter inmates Young and Robinson [defense witnesses] testified on the question of whether people are -- inmate workers are allowed out of their cells or whether it's common practice for them to be out of their cells during their days off came up and that was answered in the affirmatively [sic] by two different witnesses who were not then called to testify. That -- I believe to be a true statement of something that occurred. [¶] And if it's a major blunder by counsel not to have then called those witnesses, it is correct that counsel was aware that the testimony was available as of right after inmates Young and Robinson testified." Defense counsel was not asked to explain his decision.

There could be a satisfactory explanation for counsel's failure to call the witnesses excused by the prosecutor. Defendant identifies one of the witnesses as a correctional

officer whose testimony defense counsel may have concluded would have done more harm than good. The same may be true concerning the other witness. Defense counsel may have had a strategic reason for not calling these witnesses based on information known to defense counsel. (*People v. Hill* (1969) 70 Cal.2d 678, 690-691.) On this record, defendant has failed to demonstrate that counsel's performance was deficient.

Finally, defendant complains that the handwritten note was allowed into evidence without any evidence that he had written either side of the note or the meaning of the note.

Over defense counsel's objections, the trial court ruled that the statements on both sides of a torn piece of paper found in defendant's pocket was admissible. On one side, the note reads: "Armani I got that but what the f[---] is that? I coulda [sic] swore [sic] you said it was way bigger than that and its [sic] suppose to be 2 of them not one[.] This aint [sic] no *8th*[.] Whats [sic] happening get at me A.S.A.P" (Italics added.) The other side, in different handwriting, reads: "That's what came [sic] out for right now[.] It's another one that has not came [sic] out yet. She gave me two of those. Until I marry her she's not going to bring anymore. She thinks I'm using her so if I press her it's going to be over for everything. When freeway gets some and gives me some I will shoot it to you. Keep all this between us like I aint [sic] gave you nothing. I told you I got you don't trip."

Defense counsel argued the identity of the apparent two authors was unknown, the reference to an "8th" did not clearly

refer to marijuana, there was no date on the note, there was no evidence defendant read the note, the note was hearsay, and admission would violate defendant's confrontation rights. The prosecutor argued the note was found in defendant's pocket, one side of the note explained the other, defendant possessed marijuana, and an "8th" referred to marijuana, according to the anticipated testimony of the expert.

The court ruled the note was admissible as circumstantial evidence of defendant's possession of the sock with the marijuana. The court found the evidence was more probative than prejudicial. The court concluded the prosecutor did not have to show that defendant authored either side of the note, suggesting that defendant could have been transporting the note and marijuana for someone else.

We find no error. The note was not "testimonial" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177], that is, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Id.* at p. 51 [158 L.Ed.2d at p. 192].) The confrontation clause did not apply.

Nor was the note hearsay because it was not offered for the truth of the matters asserted therein, that is, the statements were not offered to establish someone expected more controlled substances and the other person got them from a female visitor. (Evid. Code, § 1200, subd. (a); *People v. Riel* (2000) 22 Cal.4th 1153, 1190; *People v. Waidla* (2000) 22 Cal.4th 690, 725.)

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) "Relevant evidence" is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Since defendant disputed that he possessed marijuana, the handwritten note with the reference to an "8th" was relevant to link the marijuana to defendant.

The note was substantially more probative than prejudicial. (Evid. Code, § 352.) We conclude that the trial court did not abuse its discretion in admitting the handwritten note. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249; *People v. Karis* (1988) 46 Cal.3d 612, 637-638.)

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HOCH, J.